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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/725,856	12/02/2003	Shiguang Yu	2664H-000059/US	3241
7590 12/15/2009				
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EXAMINER				
EBRAHIM, NABILA G				
ART UNIT		PAPER NUMBER		
1618				
MAIL DATE		DELIVERY MODE		
12/15/2009		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/725,856

Applicant(s)

YU ET AL.

Examiner

NABILA G. EBRAHIM

Art Unit

1618

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 26 October 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: _____.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: _____
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____
13. ☐ Other: _____.

/Michael G. Hartley/
Supervisory Patent Examiner, Art Unit 1618

/NABILA G EBRAHIM/
Examiner, Art Unit 1618

Applicant argues that the finality is improper because the rejection now states that the claims are unpatentable over Morris IN VIEW OF Kempen, whereas the rejection set out in the non-final Office Action dated January 6, 2009 alleged the claims were unpatentable over Morris OR Kempen in view of Gerth and Nagaoka. To respond to this arguments, in the Office Action, the Examiner stated that Gerth and Nagaoka were not further relied upon because of canceling claim 38. The Office Action also explained that Morris did not disclose the amounts recited in claims 5, 9 and new claims 39 and 40; however, animal foods ingredients recited in claims 5 and 9 are conventional ingredients that are known to be used in different amounts and ranges and can be optimized. Office action further stated that it relies upon Kempen who disclosed the amount of tyrosine required by NEW CLAIMS 39 and 40. Thus the new claims necessitated relying upon Kempen as a secondary reference and the finality of the Office Action is proper (see Office Action page 3, the last two paragraphs and page 4, first paragraph). Applicant also argues that Action recognizes that neither Morris nor Kempen disclose the precise amounts of ingredients recited in the claims, and concludes that "[o]ptimization of parameters is a routine practice that would be obvious for a person of ordinary skill in the art," and that it "would have been customary for an artisan of ordinary skill to determine the optimum amount of each ingredient such as protein, carbohydrate, dietary fibers, fats, tyrosine and phenylalanine." To respond to Applicant's remark, it is noted that the Examiner challenged using such protein, carbohydrate, dietary fibers, and fats (tyrosine and phenylalanine were not included in the Examiner's statement) were conventional ingredients and were used in different ranges in most—if not all—pet foods. It is the Examiner's position that this is well known in the art. Further, it is noted that facts that are well known in the art and are readily verifiable, such as when other references of record supported the fact, or where there was nothing of record to contradict it. See *In re Soli*, 317 F.2d 941, 945-46, 137 USPQ 797, 800 (CCPA 1963) (accepting the examiner's assertion that the use of "a control is standard procedure throughout the entire field of bacteriology" because it was readily verifiable and disclosed in references of record not cited by the Office). Note that the Examiner stated clearly in the same paragraph that Kempen disclosed in his composition the same ingredients; protein, carbohydrate, fat, dietary fibers. Thus, if Applicant finds that this statement is not proper, Applicant should show evidence that contradicts the statement. In addition, if Applicant is arguing the amounts of the conventional ingredients, protein, fat, fibers and carbohydrate recited in instant claims 5 and 9 then it is the burden of Applicant to show that the specific amounts of the argued ingredients show unexpected results over the prior art. Applicant argues that Morris discloses a broad range of effective amounts of tyrosine and/or phenylalanine, including amounts of from about 0.05% by weight. It is clear from Morris' disclosure, however, that Morris prefers amounts of amino acid above the upper limit (0.4%) recited in the present claims. Applicant also argues that the prior art fails to suggest that the amount of tyrosine or phenylalanine has any effect on body weight, and the primary reference to Morris specifically prefers the use of 1.65% or more of tyrosine. The superior weight loss achieved only when tyrosine is used in an amount below about 0.4% by weight therefore is an unexpected result in view of the prior art. To respond, Claim 5 recites a range between 0.01 and 0.4%. Morris disclosed ranges of at least approximately 0.05% by weight, or at least approximately 0.1%, accordingly, the two ranges overlap with the recited range and optimization is within a person having ordinary skill in the art. Applicant also argues that Morris preferably uses greater than 0.5%, and even more preferably uses more than 1.65% tyrosine. However, the reference is considered for all what it includes not only for the disclosure in a specific section or example. Further, the unexpected results of cats weight loss argued by Applicant is not recited in the instant claims and are considered expected results of using tyrosine and phenylalanine disclosed by Morris.